

**Laborers' International Union of North America,
Local 872, AFL-CIO and Stephanie Shelby.**
Case 28-CB-065507

May 3, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On May 18, 2012, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Acting General Counsel and the Respondent Union each filed exceptions and a supporting brief, the Respondent filed an answering brief,¹ and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings,² findings, and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge that the Respondent did not violate the National Labor Relations Act on October 4, 2011, when it ejected the Charging Party, Stephanie Shelby, from its hiring hall and effectuated her removal from the Respondent's property by the police for creating a disturbance.³ We disagree, however, with the judge's finding that the Respondent subsequently violated the Act by failing to take affirmative steps to remove a requirement imposed by the local police that Shelby be accompanied by a police escort on future visits to the hiring hall. As a result, we shall dismiss the complaint in its entirety.

I. FACTS

The Respondent operated an exclusive hiring hall that referred employees to multiple employers in and around Las Vegas, Nevada. Shelby was a union member who used the hiring hall to obtain employment. Over the year preceding October 4, Shelby was concerned about her proper place on the Union's out-of-work list, which the Union's dispatchers used to make job referrals. Shelby also had concerns about her "skill sheet," which recorded her certified skills and referral qualifications. She made several visits to the hiring hall in August and September to resolve these issues, but was unsuccessful.

On September 16, Shelby had a heated confrontation at the hiring hall with dispatcher Rocio Lucero concerning

Shelby's alleged failure to attend a roll call in November 2010, as required by the Union's dispatch rules.⁴ Shelby's purported absence on that occasion had resulted in her temporary removal from the out-of-work list and subsequent reinstatement at a lower place.⁵

On October 3, Shelby attended a required roll call at the hiring hall, and while there she attempted to upgrade her skill sheet. The dispatchers on duty, however, informed Shelby that she needed to bring in the relevant certification, which she did not have with her that day.

Shelby returned to the hiring hall the following day, October 4, with several "transcript sheets" concerning the skill at issue. Lucero, the dispatcher whose window she approached, told Shelby that the transcript sheets were not equivalent to the required certification. At this point voices were again raised, and Shelby (referring to the September 16 incident) said, "Look, bitch, I'm not gonna let you disrespect me like you did last week." Shelby also began to "yell" and "scream," and Lucero told her to leave. Shelby neither left nor stopped yelling (again using the word "bitch"), and Lucero told her that if she did not leave, Lucero would call the police. When Shelby continued to yell, Lucero telephoned Joe Taylor, the Respondent's hiring hall manager, whose office was on the second floor. The judge credited Lucero's testimony that Shelby's outburst was "belligerent" and made Lucero "feel nervous" and "concerned."

Manager Taylor, who could hear Shelby yelling in the background during Lucero's call and when he came out of his office, went downstairs and approached Shelby. Shelby told him not to touch her, and Taylor told her she was "86'ed" and had to leave.⁶ Shelby backed away toward the door, but continued to yell and use expletives. Taylor then called the police on his cell phone. During that call Shelby exited the building, but before doing so she admittedly told Taylor she would not leave the property. Shelby went out to the hall's parking lot and stayed there, about "40 plus" feet from the door, still yelling and refusing to leave the premises.

The police arrived shortly afterward and heard Taylor's version of the events. They handcuffed Shelby; before taking any additional action, they asked Taylor if he wanted to "trespass" her. Taylor said that he did. The police then issued Shelby a trespass (or "86") notice,

¹ The Respondent's answering brief was styled a "Reply."

² In light of our decision, we deny as moot the Respondent's exception to the judge's denial of reconsideration of his order granting the Charging Party's motion to quash the Respondent's subpoena, as well as its exception to the judge's rejection of an audio CD that it offered as an exhibit at the hearing.

³ All dates are in 2011, unless otherwise specified.

⁴ The Respondent required hiring hall registrants to call the dispatch office and to appear in person at the hall at certain times during the year to maintain their position on the referral list.

⁵ The judge found that Shelby had not provided the six-digit confirmation number that would have proved to the Union that she did not miss the roll call at issue.

⁶ The phrase "86'ed" referred to a trespass notice used by the local police, discussed below.

handed Taylor a card, and instructed him to read it aloud to Shelby. The card stated:

As a duly appointed representative of the owner of the property, I hereby warn you that you are trespassing upon this property as defined by the Nevada Revised Statute 207.200. If you do not leave these premises immediately, you will be subject to arrest for a misdemeanor. Your subsequent return to the premises after being duly warned not to return will subject you to immediate arrest for trespassing.

The police permitted Shelby to leave shortly afterward. Taylor admittedly understood the trespass notice to mean that Shelby would be arrested if she returned to the hiring hall.

There had been previous incidents at the hiring hall in which an individual, after either engaging in violent behavior or making a threat of violence, had been removed from the Respondent's property, and in some cases placed under a court order barring access to the hall. None of those incidents, however, involved a police trespass notice like the one given to Shelby, and each involved conduct (at least a threat of violence) that was more egregious than hers. Taylor also confirmed that he had not been present or involved in all of those incidents.

On October 5, the day after the incident, Shelby called the dispatch office and apologized for her behavior, either directly to Lucero or to another dispatcher. Both Taylor and Lucero were made aware of this apology, but there is no evidence that Shelby sought to speak directly to Taylor, then or afterwards, about her trespass status.

Over the next several weeks, Shelby returned to the hiring hall three times with a police escort. Taylor observed her and spoke to the police on the first of these occasions. He was aware of the other two occasions and understood that Shelby was not being allowed to return to the hall without such an escort.⁷ There were no further incidents involving Shelby during her visits, and Taylor took no further action with respect to Shelby's trespass notice prior to the Board hearing.

Although Shelby had not worked during the first 10 months of 2011, she was hired briefly by an employer by name request in November and by a second employer by name request in December.⁸ She worked continuously for the latter employer until the Board hearing.

⁷ Shelby attended a membership meeting without a police escort in February 2011, but that meeting was held at a different location.

⁸ Both of these employers were owned by union members who were parties to a Federal lawsuit against the Union alleging racial discrimination. The unfair labor practice complaint makes no allegations related to racial discrimination and it was not amended at the hearing; nor was there any evidence that the Union's conduct toward Shelby was racially motivated.

II. ANALYSIS

A. The October 4 Removal

It is well established that a union's duty of fair representation extends to its operation of an exclusive hiring hall, and that where a union "causes, attempts to cause, or prevents an employee from being hired or otherwise impairs the job status of an employee," the Board draws an inference of unlawful coercion.⁹ The union may overcome that inference by demonstrating that its actions were justified.

Here, there is no dispute that on October 4, Shelby, at least initially, was seeking to enhance her prospects of being hired by augmenting her skill sheet at the hiring hall. The Respondent's ejection of Shelby from the hiring hall at least temporarily impaired her ability to achieve that objective. We nevertheless agree with the judge that the Respondent's action was justified by Shelby's conduct that day.¹⁰

As described, Shelby began to swear at Lucero, raised her voice, and continued to scream while refusing to leave the property. As the judge found, her "loss of temper and her inability to control her actions [led] to her continued string of epithets directed at Respondent's agents"; when Taylor asked her to calm down, "she refused until the police finally arrived." The judge also found from the credited testimony that although expletives were common at the hiring hall, it was not common for a member to curse directly at a dispatcher in a personal confrontation.¹¹ In a business office setting (as opposed to a dockside or construction site), the combination of Shelby's tirade of continuous screaming, her repeated use of expletives, and her persistent refusal either to "calm down" or to leave justified the Respondent's decision to remove her from the property at that time.¹²

⁹ E.g., *Stage Employees IATSE Local 412 (Various Employers)*, 312 NLRB 123, 127 (1993).

¹⁰ In making this finding, the judge correctly distinguished *Atlantic Steel Co.*, 245 NLRB 814 (1979), which is applicable to employee-employer rather than to employee-union confrontations. For the same reason, the judge correctly observed that *Wal-Mart Stores*, 341 NLRB 796, 807-808 (2004), *enfd.* 137 Fed. Appx. 360 (D.C. Cir. 2005), and *Air Contact Transport, Inc.*, 340 NLRB 688, 690 (2003), *enfd.* 403 F.3d 206 (4th Cir. 2005), are distinguishable. The judge properly relied on those decisions only to support the legitimate distinction between expletives expressed generally and those directed at individuals.

¹¹ We do not rely, however, on the judge's finding that Shelby lost the protection of the Act "once [she] directed her first profanity at Ms. Lucero." Rather, we find that the totality of Shelby's conduct—her swearing, continued screaming, and repeatedly refusing to leave the Union's property—justified her removal.

¹² The judge correctly distinguished *Longshoremen's Local 333*, 267 NLRB 1320 (1983), cited by the Acting General Counsel. The Board in *Longshoremen* found that the union unlawfully removed a member from the jobsite after he engaged in a heated and profane exchange with a union official. The member was exercising his "statutory right to

Accordingly, we agree with the judge that the Respondent's conduct on October 4 did not violate the Act.¹³

B. Maintenance of "Trespass" Status After October 4

The judge found that, given Shelby's prompt apology and the absence of any violent or threatening behavior on her part, after October 5 the Respondent was not justified in maintaining her "trespass" status, which prohibited her from visiting the hiring hall without a police escort. As noted, the Respondent required hiring hall registrants to visit the hall periodically in order to maintain their eligibility for referrals and to attend to various other matters. And there is no dispute that Shelby's ability to gain access to the hall was hindered to some extent by the police escort requirement.¹⁴ The judge thus found that the escort requirement prevented or interfered with Shelby being hired or otherwise impaired her job status, "as the rule interferes with [her] ability to maintain her skills, file grievances, and participate in the Respondent's out-of-work list by arbitrarily restricting her access to the hiring hall."

In addition, the judge found that the Respondent failed to show that its conduct after October 4 was necessary for the effective performance of its representational function. He concluded that the Respondent's maintenance of the escort requirement coercively encouraged union membership and was arbitrary and irrational, violating Section 8(b)(1)(A) and the Respondent's duty of fair representation.

Although this is a close issue, we disagree with the judge's finding of a violation for the following reasons. The judge's finding is premised, mistakenly, on the notion that the Respondent imposed the police-escort requirement on Shelby. In fact, the police effectively placed Shelby in an ongoing "trespass" status on October

4 when, before acting on the Respondent's lawful request to have Shelby removed from the property that day, they instructed Taylor to read a card (which they provided him) to that effect to Shelby. Taylor did no more than was necessary to obtain Shelby's immediate removal; nor did he take any further action to keep the resulting access restriction in place. In short, the police-escort requirement was a direct consequence of the Respondent's lawful removal of Shelby on October 4.

Further, unlike the judge, we are not persuaded that Shelby's apology triggered an affirmative duty on the part of the Respondent to seek dissolution of the escort requirement. Although Shelby called on October 5 to apologize in some manner for her misbehavior, she apparently made no attempt to speak directly to Taylor. Nor did she convey any clear commitment not to behave in a similar manner in the future. Equally if not more important, Shelby never asked the Respondent for assistance in ending the escort requirement.

Finally, the record does not establish, and the Acting General Counsel does not contend, that the escort requirement actually impaired Shelby's employment in any way. She was able to maintain her place on the out-of-work list during the period that the escort requirement was in place.¹⁵ In addition, the escort requirement did not prevent her from being hired by the two employers who contacted the hiring hall to request her by name in November and December. There is no allegation that she suffered any resulting loss of pay or benefits.¹⁶

In these circumstances, we find that the Respondent did not have an affirmative duty to seek to lift the trespass order or the escort requirement. Accordingly, we find that the Respondent's failure to do so did not violate Section 8(b)(1)(A); nor was the Respondent's behavior "so far outside a 'wide range of reasonableness' as to be irrational" under the duty of fair representation.¹⁷

Last, we agree with the judge that the Acting General Counsel did not establish that the Respondent's conduct

voice dissatisfaction with a union's conduct and its policies . . . without suffering reprisal by being deprived of work." Id. at 1320. The Board held that the member's conduct was not "so 'opprobrious' as to cause the forfeiture of statutory protection," id., and that the union's conduct constituted unlawful coercion. The Board specifically noted, however, that the incident had occurred "on the docks" rather than "in more genteel surroundings," and that the union's conduct had deprived a member of employment. Id.

¹³ We observe that the Respondent's ejection of Shelby did not prevent her from being hired or otherwise adversely affect her employment. Cf. *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1423-1424 (2000) (overruling *Laborers Local 652 (Southern California Contractors' Assn.)*, 319 NLRB 694 (1995), in which the Board held that a union violated Sec. 8(b)(1)(A) by ejecting dissidents who disrupted meetings in violation of the union's "rules of decorum," notwithstanding the absence of any impairment of the dissidents' employment).

¹⁴ We do not rely, however, on the judge's inference that Shelby's access to the hall was restricted in part "because Ms. Lucero's husband is a Las Vegas policeman." There is no evidence that this fact made the escort requirement more onerous.

¹⁵ In fact, the record shows that Shelby would not even have had to go to the hiring hall to receive job referrals, had she reached the point on the out-of-work list where she was eligible for referrals, but rather would have been contacted by phone.

¹⁶ Indeed, the Acting General Counsel shows only that Shelby was out of work during part of the period of the escort requirement. He fails, however, to establish any causal connection between her employment status and the escort requirement.

¹⁷ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). We would reach the same result even under the "heightened" standard of fair representation that some courts apply to unions in their operation of exclusive hiring halls. See *Lucas v. NLRB*, 333 F.3d 927, 934-935 (9th Cir. 2003); *Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003). We therefore need not pass on whether a "heightened" standard applies in such cases. *Electrical Workers Local 148 (Oregon-Columbia Chapter)*, 344 NLRB 829, 830 fn. 5 (2005).

was discriminatory within the meaning of Section 8(b)(2). The Acting General Counsel did not show that the Respondent's treatment of Shelby was motivated by unlawful animus or that the Respondent treated her differently than it would have treated other members who misbehaved in the same way.

ORDER

The complaint is dismissed.

Larry A. Smith, Esq., for the Acting General Counsel.
David A. Rosenfeld, Esq. and Caren P. Sencer, Esq. (Weinberg, Roger & Rosenfeld), for the Respondent Union.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on February 22 and 23, 2012. The Charging Party, Stephanie Shelby (Shelby or the Charging Party), filed the original charge on September 27, 2011,¹ which was later amended on November 30, and the Acting General Counsel issued the complaint also on November 30. The complaint alleges that Laborers' International Union of North America, Local 872, AFL-CIO (the Respondent or the Union) has operated an exclusive hiring hall at its Las Vegas facility and provided union members with employment referrals for construction industry jobs in the Las Vegas metropolitan area in an arbitrary and discriminatory manner in violation of Section 8(a)(3) and 8(b)(1)(A) and (2) of the of the National Labor Relations Act (the Act).

Specifically, the Acting General Counsel alleges that the Union, from August through October, and especially through an incident occurring on October 4, has unlawfully threatened Shelby with exclusion from the Respondent's hiring hall and summoned the police in order to have her removed from the hiring hall because she engaged in union and other protected concerted activities. In addition, the complaint alleges that since October 4, the Respondent has unlawfully imposed a rule restricting Shelby's access to the hiring hall without police escort and restricted her ability to be referred to employment for other arbitrary and discriminatory reasons. (GC Exh. 1(e).²)

The Respondent denies the allegations in their entirety. Although the Respondent admits that it runs an exclusive hiring hall, it denies that it violated the Act in any respect and it asserts that Shelby's conduct on October 4 was not protected by the Act. (GC Exh. 1(g).)

At trial, all parties were afforded the right to call, examine and cross-examine witnesses, to present any relevant documen-

tary evidence, to argue their respective legal positions orally,³ and to file posthearing briefs. On March 29, 2012, the briefs were filed by counsel for the Acting General Counsel and the Respondent and have been carefully considered. Accordingly, based upon the entire record⁴ here, including the posthearing briefs and my observation of the credibility of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jurisdiction is uncontested. The Respondent admits, and I find, that Perini Building Company (the Employer), an Arizona corporation, with an office and place of business in Henderson, Nevada, has been engaged as a general contractor in the construction industry doing commercial construction; that as Employer, it, as well as other employers, are parties to collective-bargaining agreements with the Union; that it performed services valued in excess of \$50,000 in States outside Nevada during the past year ending September 27; and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act. (GC Exhs. 1(e) and (g); Tr. 17–18.)

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

The parties further admit, stipulate to, and I find that at all material times since at least July 1, 2005, the Respondent and the Employer, as well as other employers engaged in commerce within the meaning of the Act, have been parties to collective-bargaining agreements (agreements) requiring that the Respondent be the exclusive source of referral for employment with the Employer and other employers through the Respondent's employment referral system. I further find that the Respondent, through the operation of its employment referral system has maintained records of its employment referral system at its facility in Las Vegas, Nevada, and has required its members and those individuals using its employment referral system to report to the respondent's hiring hall facility on a periodic basis in order to maintain their eligibility for referrals. (GC Exh. 1(e) at 2, GC Exh. 1(g) at 1.)

The parties further admit, stipulate to, and I find that the Respondent operated an exclusive hiring hall for construction work at its facility at 2345 Red Rock, Las Vegas, Nevada (hiring hall), where the incidents referred to below occurred from August through October. (Tr. 10–11.) Furthermore, the parties

¹ All dates are in 2011, unless otherwise indicated.

² For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s); documentary evidence is referred to either as "GC Exh." for a Acting General Counsel exhibit, "R. Exh." for a Respondent union exhibit; reference to the posttrial briefs shall be "GC Br." for the Acting General Counsel's brief, and "R. Br." for Respondent union's brief, followed by the applicable page numbers.

³ At hearing, the Union requested that I reconsider my February 16, 2012 Order granting the Charging Party's petition to revoke the Union's subpoena. I ruled that the Union had failed to timely respond to the petition despite having two opportunities to timely review and respond to the petition to revoke. Under the unique circumstances here with a pro se the Charging Party filing a petition to revoke, I deny the motion for reconsideration. Tr. 12–15.

⁴ I hereby correct the transcript as follows: Tr. 10, L. 6: "LUCERO" should be "SHELBY"; Tr. 41, L. 6: "very" should be "vary"; Tr. 45, L. 8: "set" should be "sit"; Tr. 125, L. 10: "though" should be "that"; Tr. 137, L. 15: "Ms. Sencer:" should be deleted; and Tr. 303, L. 4: "Hear" should be "Here."

admit, stipulate to, and I find that Respondent's hiring hall manager, Joe Taylor (Taylor), and one of its dispatchers, Rocio Lucero (Lucero), are agents of Respondent within the meaning of Section 2(13) of the Act. (Tr. 9–10, 35–36.)

B. The Union's Referral System and Events at the Hiring Hall Before October 4

Taylor explained that for the last 7 years up to the hearing, he has held the appointed position of labor director of Southern Nevada Laborers, Employers Cooperation Education Trust for the Union, a full-time position and he reports to the organization's board of trustees comprised of individuals from labor and management. (Tr. 32–33, 69.) Taylor's main job responsibility is to focus on "marketing and procurement of work for our [union] members." (Tr. 33.)

In addition to his regular dealings with union members, Taylor also interacts with contractors, owners, and developers at his job at the hiring hall. (Tr. 34, 46–47.) The hiring hall is also the main place for laborers to get employment. (Id.) Taylor does not always wear an identifying union logo shirt while working though he estimates that he wears a shirt with his name on it and a varying union logo reference, including occasionally Local 872, 3 out of the 5 days he works. (Tr. 53–54.) Taylor works out of an office located on the second floor of the hiring hall. (Tr. 55.)

Shelby has been a union dues paying member of Respondent continuously since 2003. (Tr. 157.) She is a skilled laborer who gets jobs exclusively through the Respondent. (Tr. 158.) Shelby has skills in being a flagger, water truck operator, fork-lift operator, electric power jack operator, and she can operate hand tools. (Id.)

As of the date of hearing, the Respondent had approximately 3400 members locally who are primarily construction workers. (Tr. 34–35, 109, 120, 158.) Taylor further explained that the Respondent places its members in work through the out-of-work list and that generally a member is placed on the list when he or she is out of work and progresses up the list when members above them on the list are put to work through a process called dispatch. (Tr. 35, 108; GC Exh. 3.)

Union members are required to call in to dispatch eight times a year within the first 3 days of a month to comply with roll call requirements or lose their spot and revert to the bottom of the list. They must also come into the hiring hall in person four times per year depending on their last name within the same first 3 days of a new month or to get back on the out-of-work list. (Tr. 42–43, 140–141, 147, 163; GC Exh. 3.)

Lucero opined that in October 2011, there were approximately 1200 people on the out-of-work list and it took over a year to work one's way up to the top of the out-of-work list. (Tr. 141.) If one works 80 hours, they lose their spot on the out-of-work list and must go to the bottom if they become laid off. (Tr. 163–164.) When the phone-ins occur, the respondent member is given a six-digit confirmation number that they must keep to confirm their proper registration on the out-of-work list. (GC Exh. 3 at 1.)

The out-of-work list is viewable by union members at the hiring hall and it shows where on the list an unemployed worker is and how quickly they are moving up the list. (Tr. 43–44,

46–47, 110, 164.) Also at the hiring hall at the outside of the building is the dispatch list that shows which members got dispatched to jobs and how many jobs were called out over a certain period of time. (Id.)

Union members are usually matched up with employers based on their skills with the Respondent maintaining a list of these skills for each respondent laborer member. (Tr. 39–40, 109, 142.) Taylor admitted that a respondent member's documented skills with the Respondent affect their employment and that a respondent member on the out-of-work list can be passed up by a member lower on the list, if the member with the higher rank does not possess the requisite skills for a job and the lower ranked member does. (Tr. 40, 142, 158.) Taylor also opined that some employers' hiring requirements have limitations based on a respondent member's criminal history though he was unaware of any list of members' criminal histories maintained by the Union. (Tr. 49.)

Taylor further explained that a skill set is the training that the union members have received and/or certification that a member receives upon successful completion of training. (Tr. 70.) In order to prove that a union member has a currently valid skill, a member must bring in the written certification from training or a paycheck stub that shows they actually worked hours performing a skill task if their skill was not obtained at training but as on-the-job experience. (Tr. 70.) Union members must bring their employer, State, or Federal certifications, or licenses to dispatch in order to maintain or update their current skill set and must verify with dispatch that it has been noted on their skill set. (Tr. 71, 110.) Thus, to update their skill set, a union member must provide dispatch with the documentation referenced above. (Id.)

A second track or method for a respondent member to secure work in addition to the out-of-work list is for the worker to be name requested by an employer who requests a laborer by name so that they can get work even if they are at the bottom of the out-of-work list. (Tr. 35–35, 141–142; GC Exh. 3 at 4–5.) The name request method allows laborers to work continuously outside of the out-of-work list method. (Tr. 37.)

Lucero, Susan Martin, Ian Thienes, and someone named Devin are the four staff members who, work at the dispatch windows where Respondent members go for their dispatches, paying union dues, getting copies of their skill sheet, adding a skill, asking questions about filing a grievance or complaint, and handling rollcall at the hiring hall. (Tr. 41–42, 108, 110–112, 144, 148, 153, 162.) Lucero opined that anyone behind the dispatch window could help a union member about straightening out their skill sheet. (Tr. 127.) Taylor also explained that a respondent member may also go to the dispatch window to meet with their business agent at the hiring hall to discuss filing a grievance or to set up an appointment to meet with them later if they are not at the hiring hall at that time. (Tr. 45–46.) Taylor opined that 99 percent of the time, the business agents are not at the hiring hall but rather they are out patrolling jobsites. (Tr. 44–46, 70.)

Lucero has been working for the Union as a dispatcher, an appointed position, for 4 years and reports to Tommy White in her position. (Tr. 107.) She described Thienes as a cashier

who works with her behind the banker's glass at the hiring hall. (Tr. 111.)

In addition to visiting the dispatch windows, Shelby would occasionally go to the health and benefits office on the second floor to check on her pension, her credits, and to verify that she was current on her insurance premiums. (Tr. 165.) This upper floor section is accessible by way of elevator or stairs as per Taylor. (Tr. 46.) He also opined that the lobby area where dispatch is located is on the first floor comprised of approximately 700 square feet and the entire hiring hall is approximately 26,400 square feet. (Tr. 54–55.)

Taylor described seeing respondent members frequently curse, yell, and be upset at the hiring hall because of the length of time they remained unemployed and on the out-of-work list. (Tr. 37–39.) Taylor opined that cursing and yelling in the hiring hall was not unusual because of the construction work nature of respondent laborers and that he also curses and yells. (Tr. 38–39, 109.) Taylor opined that he is exposed everyday, every hour, to respondent members swearing at the hiring hall but not yelling. (Tr. 52.)

Taylor believes that respondent members occasionally get mad, get angry, yell, and cuss in front of him and that does not bother him but that there is a difference between this and becoming irate or psychotic. (Tr. 49.) Taylor, a former Marine, miner, and active in the construction industry for 25 years is not bothered by a woman swearing though he does not swear in front of women. (Tr. 49–51.) If, instead, Taylor is with a group of men, however, he freely swears. (Tr. 50.)

Taylor explained that he created the normal, unwritten practice or procedure the Union uses at the hiring hall when he has an irate or very upset union member in front of dispatch. The procedure is for Taylor to get them out of the building, away from staff, and other union members and ask them to leave. (Tr. 82–83, 87, 90–91, 98.) Respondent also does not have a published policy or rule against cursing and there are no “No profanity” signs or anything like that at the hiring hall. (Tr. 125–126.) Profanity amongst union members is common in Respondent's hiring hall, including by some of its agents but not profanity directed at dispatchers. (Tr. 38–39, 50–52, 125.)

Taylor estimates that over the past 3-1/2 years that the current hiring hall has been open and everybody is housed in the same building, he has escorted five or six respondent members out of the building. (Tr. 52, 73.) He believed that of those five or six times, only one time did he call Metro, the Las Vegas police, when a man took a few steps while also being physically aggressive toward him with his fist “hauled up.” This individual, however, left the premises on his own, half way through the call to the police so Taylor disregarded having the police come out to the hiring hall. (Tr. 73, 92.) Before then, Taylor was called to come over and escort one other person out of the former hiring hall but he never caused a union member to be cited off the hiring hall premises for trespassing before Shelby. (Tr. 52–53, 73, 86.) Taylor did recall that union members David McCann, George McDonald, and Charles Porter had been trespassed away from the hiring hall by someone else more than 3 years ago for threats of violence with a knife and a broken window involved in two of the three events. (Tr. 92–95; GC Exh. 4.) Lucero recalled one incident before the present

hiring hall location which caused the local police to arrive and involved a union member and a threat at the building. (Tr. 129.)

Taylor also opined that a respondent member cannot just go into the hiring hall and sit down with a dispatcher due to safety concerns and the fact that the dispatchers work behind thick bulletproof glass like bankers' glass. (Tr. 47–48, 72, 167.) As a result, a member cannot get from the lobby to the dispatch office without going through a key-coded door by being buzzed in. (Tr. 48, 112, 167.) Lucero added that there is also a space next to the dispatch area that no one is allowed access to in another room on her side of the key-coded door where union members can use to sit at a table and fill out paperwork at times. (Tr. 112.) Respondent members can talk to dispatchers through the tray opening at the dispatch window and it is not hard to hear from either side of the glass. (Tr. 48, 72, 167.)

B. Events Involving Shelby from August 1 Through October 4

Other than jobs she obtained in November and December, Shelby was on the out-of-work list throughout the rest of 2011. (Tr. 163.)

Lucero described three or four times from August 1 through October 4 when Shelby came to dispatch with some concerns about her skills sheet, her position on the out-of-work list, her rotation number in relation to that out-of-work list, a dispute about a missed rollcall, and about filing a grievance over the information on the missed rollcall. (Tr. 113, 115, 139–141.) Before that time, Lucero recalled Shelby's employer name request dispatches as a dispatcher including one from Southern Nevada Flaggers, Barricades, and Flagging. (Tr. 116.)

Shelby described her concerns as involving deleted skills that she discovered in August. (Tr. 165, 189.) She determined that Lucero deleted the skills as Lucero left her initials next to the date listed for deletion. (Tr. 223.) Shelby believes that her skills have been deleted on her skill sheet since 2009, and that was something she said she “took to the union.” (Id.) Shelby said she spoke to Susan Martin a couple of times and on August 26, Shelby asked her for a printout of her skill sheet. (Tr. 166–167.)

Also, Shelby explained that on September 12, she went to the hiring hall and she was reviewing the out-of-work list and Shelby asked Lucero what the December 10, 2010 date meant next to Shelby's name on the list. (Id.) Lucero responded, “That's when you get back on the out-of-work list.” (Id.) Shelby disputed the accuracy of the list as she believed that she had gotten on the list as of August 16, 2010, and had not missed any rollcalls. (Id.) Lucero offered to take Shelby back inside the hiring hall and when she pulled up Shelby's name she saw that Shelby had apparently missed a November 2010 rollcall. (Id.) Shelby says next she asked Lucero for a printout and she gave Shelby a printout and purportedly on the printout it proved, according to Shelby, that she did not miss the November 2010 rollcall and it also proved that Lucero deleted something off of Shelby's records on December 3, 2010. (Tr. 165–166.)

Shelby further added that she returned to the hiring hall on September 16 and again spoke to Lucero and Shelby asked her,

"Can I file a grievance?" and purportedly Lucero responded by yelling at Shelby, "Are you kidding me, are you kidding me, for what Stephanie, for what, you don't have nothing." (Tr. 166.) Shelby responded to Lucero by saying that Lucero told her that she missed rollcall in November 2010, and Shelby did not think she did. Shelby responded by telling Lucero that she needed to be talking to Shelby's lawyer. In further response, Lucero yelled "Bye, bye." (Id.)

Lucero further admits that she had this heated confrontation with Shelby and voices were raised. (Tr. 114–115.) Lucero confirmed that while she had a heated confrontation with Shelby before October 4, the police were not called in, Shelby was not trespassed off the hiring hall premises, Shelby did not threaten Lucero, and Lucero did not have to call anyone to escort Shelby out of the building. (Tr. 115.) Heated conversations were not unusual to Lucero though before October 4, they always resulted in the members voluntarily leaving the premises without incident and the members returning the next day to apologize for their part in creating the heated conversation.

On September 27, Shelby went to the hiring hall to pay her union dues and she asked Susan Martin for a printout "to prove that [Shelby] didn't miss rollcall for December [2010]" and Martin purportedly told Shelby she could not provide her with such a printout. (Tr. 166.)

On October 3, a date that Shelby had to appear in person at the hiring hall for rollcall, she attempted to upgrade her skill sheet and the dispatchers asked Shelby to bring back her certification and Shelby intended to bring it back the following day—October 4. (Id.)

Lucero agreed that each of these issues that Shelby came to dispatch for during this time period were not resolved to Shelby's satisfaction. (Tr. 116, 139.) Lucero explained that the problem with Shelby's skill sheet was that her "flagger" certification on file at dispatch had expired which deletes this skill from the skill sheet and Shelby needed to provide a current certification. (Tr. 139–140.) Lucero also confirmed that a union member can put a deleted or expired skill back once they provide proper certification. (Tr. 140.)

Lucero was also aware of a problem that Shelby had with her position on the out-of-work list as Shelby believed that she should be higher on the list. (Tr. 140–141.) Lucero told Shelby that it was probably because Shelby missed rollcall and that she would have to get back on the list to correct the situation. (Id.) At no time did Shelby provide any six-digit confirmation number to prove that she did not miss a November 2010 rollcall. (See GC Exh. 3 at 1.) Lucero further explained that with respect to Shelby's belief that she did not miss a rollcall and that dispatch had made a mistake as to her low position on the out-of-work list, Shelby did not file a grievance even though Lucero told Shelby that she would need to put her complaint about her concern of her low out-of-work position in writing and submit it to Tommy White, Lucero's boss. (Tr. 141, 147–148.)

Shelby also attempted to correct some of the same problems she perceived with Respondent by writing a series of letters to Respondent's headquarters addressing various issues. These letters included: an August 15 letter to Respondent's president alleging sexual harassment; a September 16 letter to the presi-

dent about Lucero's deletion on Shelby's skills; a letter about an alleged September 12 phone call from Respondent which was sent to headquarters; a letter dated September 19 about the out-of-work list; a letter regarding Joe Ford III; a letter regarding her request for a rollcall printout; and another letter regarding the deletion of her skills. (Tr. 217–218, 222–225.) Shelby also sent the letters to Respondent's headquarters to inform them of the problems and to resolve the issues internally. (Tr. 232.) The issues had not been resolved prior to October 4. (Tr. 113.)

D. The October 4 Incident

On October 4, Shelby returned to the hiring hall lobby and handed her transcript to Lucero as a followup to being there the day before in an attempt to upgrade her skill sheet. (Tr. 123, 167.) This discussion was a continuation of the previous issues which Lucero had been discussing with Shelby since August 1. (Id.) Shelby brought some transcript sheets to Lucero and the two had a disagreement about whether these transcript sheets were adequate to update Shelby's skills. (Id.)

On October 4, after handing to Lucero what Shelby thought was needed to update her skill sheet, Lucero responded by stopping Shelby and saying, "This is not your certification." (Tr. 167.) Shelby responded by asking Lucero, "Well, what is it?" (Tr. 168.) Lucero repeated herself and said, "It's not your certification." (Id.) Shelby repeated her question—"Well, what is it?" (Id.) Lucero responded saying, "Look, Stephanie, what's the problem you have with me?" (Id.) Shelby responded by saying, "I don't have no [sic] problem with you." (Id.) At this point, Shelby says that Lucero started yelling again. (Id.)

In response to this, Shelby said to Lucero: "Look bitch, I'm not gonna let you disrespect me like you did last week" or something similar and actually meaning their last encounter on September 16 where Shelby, now had twice called Lucero a bitch. (Tr. 124–125, 143, 168–169.) Shelby asked for a return of her transcript papers and Lucero, refused to return the papers and, in a raised tone of voice, immediately asked Shelby to leave and Shelby did not appear to Lucero to want to leave. (Tr. 125, 145, 150, 168–169.) Lucero also claims that she told Shelby that Lucero was not going to talk to Shelby if she was going to talk to her by calling her a profanity. (Tr. 126.) Next, Lucero says to Shelby that if she doesn't leave, Lucero was going to call the Las Vegas Metro (police) and Lucero continued to hear Shelby yelling and screaming. (Tr. 126, 143.) Finally, Lucero says, "ok," and she picks up the telephone and calls Taylor to come escort Shelby out of the hiring hall. (Tr. 124–125, 131, 143.)⁵ Lucero did not call 911 because of Shelby's statement, Lucero did not see any weapon in Shelby's possession, she was not threatened by Shelby, and Lucero agreed that Shelby could not touch Lucero because she was

⁵ Normally there is a surveillance camera that monitors the activity in the lobby/dispatch area and this surveillance film was properly subpoenaed by the Acting General Counsel in this case. The Respondent's counsel represented at hearing, however, that on the day in question, October 4, the surveillance system was down or not functioning and was down for 3 weeks. Tr. 131–138.

behind the dispatch counter glass.⁶ (Tr. 124–125, 129.) Lucero did credibly say that Shelby's outburst was belligerent and made her feel "nervous" and concerned. (Tr. 145.)

Lucero estimated that her conversation with Shelby lasted from 10 to 15 minutes and that Shelby was the first one to raise her voice as she appeared not to like Lucero's explanation of what Shelby needed to update her skill sheet. (Tr. 142–143.) Shelby's account of the disagreement is different and she claims that Lucero raised her voice first as she had previously done on September 16. (Tr. 167–168, 196.) There is no dispute that at some point in their conversation, Lucero also raised her voice. (Tr. 145.) Normally, Lucero tries to calm union members down when they begin to get upset and raise their voices and she opined that normally the upset member will just voluntarily leave the dispatch window. (Tr. 143, 146.)

Lucero claims that being called a bitch by Shelby is what caused her to end her conversation with Shelby and, Lucero did not know of any other situation in dispatch where a union member's cursing was *directed at her* like Shelby's rather than simply in her presence and not directed at her. (Tr. 125, 146, 149–150, 154.) Lucero has never had to call for somebody to be escorted out of the hiring hall because they usually just leave when they are upset or irate and come back later and apologize. (Id.)

Taylor also worked on October 4 and explained that received a phone call from Lucero in dispatch stating that he needed to come downstairs because there was a member who was irate and he explained that he could hear the member over the phone. (Tr. 55–56, 126.) Lucero did not tell Taylor why Shelby was upset. (Tr. 57, 127.) Taylor opined that occasionally he can hear some of the things that are going on in the lobby from his second floor office. (Tr. 55.) Taylor recalled that this is exactly what he heard on October 4 when he exited his office—he heard a female screaming and yelling. (Tr. 56, 72.)

Taylor proceeded to go downstairs to the lobby but claims he took the elevator instead of using the stairs as Shelby convincingly recalled. (Tr. 56, 60.) I found Shelby's version of what happened on October 4 more credible than Taylor's version. I find that Taylor, an ex-Marine who appeared fit at hearing, performing his customary role as the hiring hall bouncer is more likely to have immediately darted down the stairs to protect dispatch than to have waited for an elevator to arrive, open, and slowly descend to the first floor. (Tr. 51–52, 69–70, 86, 90–91, 96.) I also find it more reasonable that Taylor could get downstairs more quickly using the stairs and that in circumstances involving a potential threat of violence especially given Taylor's knowledge of past history and events involving threats of violence at the hiring hall. Taylor admitted that he went downstairs for the limited purpose of removing from the lobby

and building the individual that Lucero called him about being irate. (Tr. 57–58.)

When Taylor first saw Shelby on his arrival downstairs he saw her standing just inside the lobby side of the dispatch area about 5 or 6 feet away from the dispatch window in the lobby. (Tr. 56, 74.) Taylor does not recall seeing anyone else in the lobby except Shelby as he was only focused on her. (Tr. 60, 74.) He claims his first words to Shelby on arrival were "calm down, calm down." (Tr. 57, 74–75.) Shelby convincingly recalled that he came down the stairs yelling and screaming at her to get out, get out, you are 86'ed.⁷ (Tr. 169–170.) Taylor recounted that Shelby's response to him after he took one step toward her was "Don't put your hands on me" "don't touch me" in an irate manner where he further told her "Ma'am you need to leave the building." (Tr. 57, 74–75, 127, 170.) Neither Shelby nor Taylor had ever seen or knew each other before this encounter. (Tr. 57, 74–75, 127, 169.) Taylor denies touching Shelby or putting his hands out such as if he was going to touch her though Shelby described him as approaching her as if he was going to grab her. (Tr. 75, 170.) He confirmed that Shelby had no idea who he was either based on her comments. (Tr. 97, 169, 172.)

After he told her she needed to leave the building, he recalled seeing Shelby take two or three steps backward toward the exit door before he repeated that she needed to leave. (Id.) Next, Taylor describes Shelby as starting to walk again out the exit door and stopping and starting to scream in an awful pitch. (Id.) He could hear Shelby saying something about papers, deleting her skills, and how the union is against her and discriminates. (Tr. 75–76, 98.) Taylor estimates that from the time that he came downstairs until the time that he called the police, a little over 2 minutes had passed with the exchange between Shelby and him with Shelby slowly making her way out of the building and occasionally cussing—the gist of which included statements from Shelby such as, "Why are you mother fuckers against us all the time" and "Why ya'll want to screw with us." (Tr. 75–76, 95–96, 170.) Shelby recalled saying to Taylor—"Motherfucker, you better not touch me." (Tr. 170–171.)

Taylor did not think he and Shelby had any physical altercations and he was not threatened by Shelby, nor did he know or think she had threatened anyone or had a weapon when he arrived to escort her off the premises. (Tr. 58, 65.) Taylor followed Shelby out of the building to make sure that she did not come back through the front doors. (Tr. 76–77.) Taylor admitted eventually calling 911 after Shelby was already outside the building to have Shelby trespassed off the property.⁸ (Tr. 58,

⁷ Being "86'ed" is understood to mean trespassed off the property. Tr. 61, 130.

⁸ The Respondent attempts to make reference to the October 4 conversation from the 911 operator at the Las Vegas police. An audio disk CD purportedly of the 911 call from October 4 between Taylor and Las Vegas police was entered into evidence conditioned on there being an accompanying written transcript. Tr. 78, 302–308; R. Exh 1. Moreover, at hearing, the Respondent was directed by me to provide a written transcript of the audio CD from the court reporter or through joint stipulation of the parties or a motion if someone else transcribed the CD disk for the record in this case. Tr. 78, 302–308. Respondent did not

⁶ Later on cross-examination, Lucero changed her testimony from not feeling threatened at any time by Shelby to saying she felt intimidated by Shelby's October 4 outburst. Tr. 144, 151. I reject Lucero's changed testimony and I do not find this new testimony credible given Lucero's position as the Respondent's admitted agent and because I found her initial opinion that she was not threatened by Shelby more genuine and believable having observed her testify at hearing. See Tr. 124–125, 129, 145.

61.) He explained that he usually just asks an irate union member to leave the building and does not need to call the police. (Tr. 83.) Taylor decided to call the Las Vegas police, the Metro, on October 4, because Shelby was so irate and he did not know what she was going to do or capable of doing and she refused to leave the parking lot. (Id.)

Taylor believed he was just outside the front doors of the hiring hall when he called 911 and that Shelby was also outside the building in the parking lot and approximately 40 plus feet away from where he was standing. (Tr. 58–59, 79, 83.) Lucero remains behind glass at her dispatch post inside the building when Taylor called the Las Vegas police. (Tr. 59.) Taylor remained standing in front of the front door of the hiring hall and described Shelby as not leaving the premises and not calming down in the parking lot, ranting and raving all the time while the police were on their way in response to his call. (Tr. 77, 83, 171.) Shelby admits that she told Taylor after he called the police that she refused to leave the premises. (Tr. 171.)

Approximately 20 minutes after Taylor called 911, the police arrived to the hiring hall parking lot in response to the 911 call, they talked to Taylor, and he asked them to trespass Shelby. (Tr. 60–61, 77, 128.) Shelby immediately calmed her yelling down but started to cry when the police first arrived. (Tr. 83–84, 173.) Despite her calming down when the police arrived, they still proceeded to handcuff Shelby. (Tr. 98–99, 173.)

The police took Shelby to a second police car where she sat handcuffed while one policeman went into the hiring hall with Taylor. (Tr. 173.) The police also spoke to Taylor who gave them his version of the events—that he was called downstairs, Shelby was irate, Taylor asked her to leave the premises, she wouldn't leave the premises, and he called the police. (Tr. 84–85.) The police then asked Taylor if he wanted to trespass Shelby and he told them yes, he did. (Tr. 85.) Based on what Taylor told them, the police then issued Shelby a trespass notice or an 86. (Tr. 61, 130, 156–157, 276; GC Exh. 5 at 2.) Taylor considered himself an officer of the Respondent and read the following language to Shelby:

As a duly appointed representative of the owner of the property, I hereby warn you that you are trespassing upon this property as defined by the Nevada Revised Statute 207.200. If you do not leave these premises immediately, you will be subject to arrest for a misdemeanor. Your subsequent return to the premises after being duly warned not to return will subject you to immediate arrest for trespassing.

(Tr. 85, 99, 173, 276; GC Exh. 5 at 2.) Taylor further interpreted the trespass notice as meaning that if Shelby ever came back to the hiring hall premises, she would be arrested. (Tr. 85; GC Exh. 5 at 2.)

The Las Vegas police proceeded to cite Shelby for trespass. (Tr. 61–62; GC Exh. 2.) After reading from the trespass card, Taylor went into the hiring hall and the police told Shelby that

provide a written transcript as represented at the end of hearing and I reject the CD and any reference to the 911 call operator without a verifying written transcript. Moreover, contrary to a joint agreement between the parties at hearing, no motion was filed with a transcript of the audio from the 911 call to review or to consider. See Tr. 306.

she was in handcuffs because she was upset but after Taylor read the card and Shelby was cited for trespass, the police took off the handcuffs and told her to wait awhile before driving home so she would not be too upset to drive safely. (Tr. 173–174.) Shelby left the premises before the police. (Tr. 174.)

Following Shelby's exit from the premises, Taylor did not submit a report, an email, or anything else to document the incident. (Tr. 99–100.)

E. Shelby's Status at the Hiring Hall after October 4

On October 5, Shelby called the dispatch office at 6:30 a.m. and asked for Susan Martin who was not in. (Tr. 175–176.) Instead, Lucero answered the telephone and Shelby apologized to her for her behavior the day before and asked if she could send her a skill sheet. (Id.) Lucero responded to Shelby by saying that she needed a CDL (commercial driver's license) to drive the water truck and Lucero sent Shelby a skill sheet. (Id.)

Taylor confirmed that he was told by the union's business manager, Secretary-Treasurer Tommy White, that since the October 4 incident, Shelby called into the hiring hall and apologized to the Union for her October 4 behavior. (Tr. 67–68.) Lucero was also aware that Shelby had called the hiring hall on October 5 and apologized for her behavior on October 4, but Lucero denies talking directly to Shelby or sending her a skill sheet. (Tr. 129–130.) Taylor was also aware of another apology by Shelby to Ian Thienes at dispatch on the first day of this hearing through John Stevens (Stevens), a business agent for the union. (Tr. 68.)

After the October 4 incident and Shelby's trespass citation, Taylor believed that Shelby was permanently ordered off the premises and would not be allowed back to the Respondent's hiring hall.⁹ (Tr. 63, 85.) Shelby similarly thinks that after the trespass notice was issued against her, it remains active against her and she must have a police escort in order to go to the hiring hall. (Tr. 174.) Taylor was surprised to see her later at the hiring hall with a police escort. (Tr. 62, 85.) Taylor credibly admitted that by being trespassed on October 4, Shelby would not be allowed to come back onto the hiring hall property in the future because the trespass had an ongoing requirement of only being allowed access to the hiring hall with a police escort. (Tr. 63–66.) Lucero admitted that her husband is a police officer. (Tr. 130.)

⁹ Taylor's testimony vacillated on this subject. He was clear that by being trespassed on October 4, Shelby was permanently ordered off the premises and would not be allowed to come back onto the hiring hall property in the future because the trespass had an ongoing requirement of only being allowed access to the hiring hall with a police escort. Tr. 63–65, 85. He denied it was his intention or understanding, however, that the trespass would be ongoing and completely ban her from the property. Tr. 63–65. Taylor also did not understand that by receiving the trespass, Shelby would have the ongoing requirement of needing a police escort to return to the hiring hall. Tr. 62–63. Observing Taylor testify at hearing, I do not find credible his inconsistent statements that his actions in causing Shelby to be trespassed on October 4 do not affect her future and current access to the hiring hall property or require her to have a police escort especially when he said that the police told him the effect of trespassing Shelby was to permanently order her off the premises. See Tr. 63–65, 85.

Lucero saw Shelby return to the hiring hall after October 4 with a police escort. (Tr. 129.) Taylor also admitted that he never took actions to remove the trespass or lift the trespass charge against Shelby even though he saw her 2 or 3 weeks after the October 4 incident with a police escort and he believed that it was a waste of resources. (Tr. 66.) He did question the police when they were escorting Shelby to the second floor to visit member services at this time and he asked the police, “Why are you here (meaning Shelby) and why are you here (meaning the police).” (Tr. 86.) The policeman responded to Taylor that he was escorting Shelby onto the hiring hall property to member services. (Id.) Taylor and Lucero believe that Shelby has visited the hiring hall property with her police escort three times since she first came back with the police escort and there have been no further issues involving Shelby or her conduct at the hiring hall. (Tr. 66–67, 87, 143–144.)

Taylor repeated that other than Shelby, he knows of only two other union members to be trespassed from the hiring hall property but those other two involved actual threats of violence and the two individuals trespassed for threatening violence had restraining orders issued against them. (Tr. 65, 88; GC Exh. 4.) Taylor recalled seeing one of the two union member removed from the hiring hall for threats of violence, Charles Porter, return to the hiring hall without a police escort as Taylor thought that Porter’s restraining order was lifted 2 years after his event. (Tr. 89, 100.) Before the October 4 incident, Taylor had not removed a person from the hiring hall premises simply for yelling without a threat of violence or actual property damage. (Tr. 91–92.)

Shelby described getting jobs in November and December through the second track system at the Respondent where her name had been requested by employers Southern Nevada Flagging and Barricade for a 2-day job on November 17 and 18, and with Six Star Cleaning beginning on December 16 where Shelby remained working through the time of hearing. (Tr. 159.)

III. ANALYSIS

A. *Credibility*

There were three primary witnesses in this case: Shelby, and the union agents employed at the hiring hall—Lucero and Taylor. The facts that follow are largely based on documentary evidence and the testimony of Shelby, Lucero, and Taylor. Except as noted hereafter, their testimony was mutually corroborative and their demeanor was entirely convincing. Shelby, however, impressed me with both her ability to recall the events and relate them as accurately as she could. Lucero and Taylor were entirely unconvincing as to specific facts referenced above such as Taylor’s use of stairs on October 4 and Lucero’s denial that Shelby called dispatch and apologized. I give more specific examples below why I have decided generally not to credit portions of their testimony unless it stands as an admission of a party opponent or is consistent with Shelby’s recitation of key facts.

Shelby began to cry uncontrollably while testifying and I observed her to be a very emotional person consistent with her outburst on October 4. After observing Shelby’s lack of control over her emotions at trial, I infer that on October 4 she had a similar emotional outburst that she could not control that in-

creased in intensity to her repetitive use of profanities directed at the Respondent’s agents, Lucero and Taylor, and this outburst advanced to belligerence and continued until the police arrived outside the premises.

Stevens was not credible with his conclusory descriptions of the past respondent members who were trespassed and had been involved with incidents requiring them to be banned from the hiring hall for threats of violence or actual property damage which caused the Respondent to actively follow up with restraining orders against these individuals. (See GC Exh. 4.) Stevens testified in a cavalier manner describing these prior incidents as merely involving overly boisterous and belligerent conduct which he opined was similar to that of Shelby’s in this case. (Tr. 312, 314–319.) I reject this testimony and find that the circumstances involving McCann, Porter, and McDonald are highly distinguishable from the October 4 incident involving Shelby as discussed below. The three incidents before Shelby’s October 4 incident all involved threats of violence where Respondent reacted reasonably by securing restraining orders against each individual. (GC Exh. 4.) Here, Shelby simply cursed at a dispatcher but did not pose a threat to anyone yet she was permanently banished from the hiring hall premises the same as if she had threatened a union member with a knife as Porter.

I also reject Stevens’ testimony regarding Shelby’s apology as his initial recollection that she apologized to the Union for the October 4 incident is contradicted later in his testimony in a manner I found to be unconvincing and unbelievable. (Tr. 246–247.) Moreover, Taylor and Shelby convincingly testified that Shelby apologized twice, once on October 5 and a second time on the day trial began in this case also contradicts Stevens’ changed testimony on this subject matter. (Tr. 68, 175–176.)

In addition, contrary to the Respondent’s recitation of facts in its closing brief: (1) Shelby did not concede that she raised her voice toward Lucero first; (2) Lucero did not state that she was concerned for her safety with Shelby’s outburst; (3) Shelby actually calmed down immediately when the police arrived; (4) the statement “your subsequent return to the premises after being warned not to return will subject you to immediate arrest for trespassing” is very clear in its meaning and Taylor and Shelby both acknowledged its meaning that Shelby is not allowed back to the hiring hall premises without a police escort; (5) there is a claim that the Respondent’s conduct toward Shelby has restricted her ability to be referred to employment with other employers; (6) the Union did not impose a valid permanent no trespass order against Shelby that requires any further affirmative action from her beyond the apologies she has provided; and (7) the Union’s permanent no access without police escort rule against Shelby had an impact on Shelby’s employment as the Respondent admits that Shelby “may be ever so slightly inconvenienced by being escorted by the police” and that to remove this permanent interference to her employment rule she must “take . . . appropriate action to ask the [U]nion to [lift the impediment.]” even though she has already apologized two times. (Tr. 67–68, 129–130, 175–176; GC Exh. 1(e) at 3; R. Br. 4–7, 9–10.) This long string of factual inaccuracies by the Respondent raises issues as to the overall veracity of its positions in this case.

B. The Respondent had a Legitimate Interest in Temporarily Banning Shelby From the Hiring Hall Premises Because Shelby's October 4 Profanities were Unprovoked and Directed at the Respondent's Agents Making Shelby's Conduct Unprotected by the Act

Paragraphs 6(a) and (b) of the complaint collectively allege that on or about October 4, the Respondent, by Taylor, threatened Shelby with exclusion from the Respondent's hiring hall because she engaged in union and other concerted activities, including her challenge of the Respondent's system regarding maintenance of her skill sheet showing the jobs she was qualified to perform pursuant to the Respondent's employment referral system and Taylor summoned the police in order to have Shelby removed from the hiring hall premises because of her union and concerted activities.¹⁰ (GC Exh. 1(e) at 3.)

It is not disputed that the Union has exclusive hiring hall arrangements with employers for construction work in and around Las Vegas, Nevada.

It is well established that as the operator of an exclusive hiring hall, a union owes a duty of fair representation to members who use the hall. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that a union breaches its duty of fair representation by conduct toward a member of the collective-bargaining unit that is "arbitrary, discriminatory, or in bad faith," 386 U.S. at 190. Where a union causes, attempts to cause, or prevents an employee from being hired or otherwise impairs the job status of an employee, it demonstrates its power and influence over the employee's livelihood so dramatically as to compel an inference that the effect of the union's actions is to encourage union membership on the part of all employees who have perceived the display of power. A union may overcome this inference or rebut this presumption, by proving that the action was necessary to the effective performance of its function of representing its constituency.¹¹ See, e.g., *Teamsters Local 456 (Louis Petrillo Corp.)*, 301 NLRB 18, 22 (1991).

The legitimate interests of a union must be carefully balanced against the interests of individual employees when those employees are engaging in protected activity. *Longshoremen Assn. Local 341*, 254 NLRB 334, 337 (1981). Where activity is unprotected, however, there is nothing to balance against the union's need to effectively represent its constituency. *Id.*

In this case, everyone agrees that Shelby's activities leading up to her profanity-laced outburst on October 4 were protected activities. (Tr. 113, 139–141, 322; R Br. 7.) I find that under the circumstances of this case, once Shelby directed her first profanity at Lucero and was simply asked to leave the hiring hall premises, her protected activity crossed the line and became unprotected. Moreover, there was no protected activity once Shelby continued to direct additional profanities at Lucero

and Taylor. The matter escalated not because of Lucero's actions but because of Shelby's loss of temper and her inability to control her actions leading to her continued string of epithets directed at Respondent's agents when Taylor finally asked her to calm down and she refused until the police finally arrived.

While cursing in general may have been common at the hiring hall, it is apparent that profanities directed at the Respondent's agents never occurred before Shelby's October 4 outburst. The distinction between general cursing at work and swearing toward someone is that one can act belligerently, i.e., irate, eager to fight, and out of control but when the profanity becomes directed at a target, one crosses the line from just blowing off steam to becoming a safety concern.¹² I find that a union member occasionally blowing off steam was a common occurrence at the hiring hall but directing profanities toward a dispatcher target had not occurred before Shelby's outburst on October 4 caused concern and nervousness to Lucero.

While I agree that the Respondent's reliance on *Atlantic Steel Co.*, 245 NLRB 814 (1979), to evaluate a confrontation between a member and a union agent is misplaced, the case relied on by the Acting General Counsel is also distinguishable. The Board in *Longshoremen Local 333*, 267 NLRB 1320 (1983), found that Moore was exercising his protected right to question the union's authority with respect to its rotation policy and, unlike our facts, that it was not unusual for Moore and union official Howell to resort to strong language laced with profanity directed toward each other, an occurrence which the Board found was not unusual on the docks and could not justify the union's reprisal against Moore by having him removed from the crew. In contrast, Lucero credibly opined that no one has previously directed their profanities at her as dispatcher as Shelby did on October 4. Even Shelby admits that it is not right to direct profanities at union agents and she would not want similar treatment at work. (Tr. 227–228.)

The Acting General Counsel also argues that Lucero's actions on October 4 were the result of personal animus as evidenced by her deletion of Shelby's skills, her previous raised voice to Shelby and her raised voice again on October 4. (GC Br. 28.) I find that no evidence was presented to substantiate this claim. The hiring hall rules plainly state that members can obtain confirmation numbers to prove their compliance with rollcall rules yet nothing was presented to show that Shelby's missed rollcall in November 2010 was suspect. (See GC Exh. 3 at 1.) Also, the deletion of Shelby's skills through the passage of time or lack of experience was not proven wrong by any evidence to the contrary. Finally, I do not find that Shelby's profanity outburst was provoked by Lucero raising her voice or in any other way. Raised voices unlike profanities directed toward dispatchers were a common occurrence and sometime a

¹⁰ As pointed out by the Acting General Counsel, the fact that portions of the charge were dismissed because they were time-barred by Sec. 10(b) is not dispositive of whether the Respondent had committed unfair labor practices against Shelby in the past or whether its recent conduct with Shelby since August were provocative on the part of the Respondent. GC Br. 26; R. Exh. 2.

¹¹ A union may also show it was acting pursuant to a valid union-security clause; however, such is not an issue here.

¹² While the analysis is different in the context of the employer-employee relationship as compared to the union member-union agent relationship here, the distinction between profanities commonly used in the workplace as not jeopardizing protection under the Act versus the uncommon practice of directing profanities at an individual creating unprotected activity under the Act is the same. See, e.g., *Wal-Mart Stores*, 341 NLRB 796, 807–808 (2004) (unprotected conduct where profanities directed toward supervisors); *Air Contact Transport, Inc.*, 340 NLRB 688, 690 (2003) (same).

necessity due to the thick glass at the dispatch window. Again, I find that Shelby's own temperament and frustrations, while in general not uncommon among other construction worker members, crossed the line and became unprotected activities once the profanities surfaced and were directed toward the Union's agents.

I therefore find that Shelby's conduct on October 4 was unprotected once she directed a profanity toward Lucero and the Respondent did not violate Section 8(b)(1)(A) of the Act. Alternatively, I further find that the Respondent's action in asking Shelby to leave the hiring hall and having her escorted off the premises on October 4 because of her use of profanities directed toward union agents and her increasingly belligerent conduct was necessary for the effective performance of the Respondent's function of representing its constituency. I further find that under the circumstances of this case, the Union did not fail to represent Shelby fairly. I further find that the Respondent did not violate Section 8(b)(1)(A) of the Act as alleged in the complaint and that portion of the complaint is dismissed.

C. The Respondent Union has Failed to Show Adequate Justification for Permanently Barring Shelby from Unfettered Use of its Exclusive Hiring Hall System in Violation of Section 8(b)(1)(A) and (2) of the Act

Paragraphs 7(a), (b), and (c) of the complaint collectively allege that because of Shelby's union and other concerted activities, since on or about October 4, the Respondent has imposed a rule restricting Shelby's access to the Respondent's hiring hall without police escort and by this conduct the Respondent has restricted the ability of Shelby to be referred to employment with the Employer and other employers.¹³ (GC Exh. 1(e) at 3.)

The Respondent readily admits that since October 4, Shelby's ability to freely access the hiring hall has been restricted by the unwritten union rule that Shelby gain access to the hiring hall only if she has a police escort. (R. Br. 9–10, 13.) In fact Respondent further admits that:

We agree that if Ms. Shelby does not ask to clarify whether she could come to the hall without police escort, she may be ever so slightly inconvenienced by being escorted by the police.

(R. Br. 9.)

Both Shelby and Taylor reasonably believed this to be the permanent rule applied against Shelby for being trespassed off the hiring hall premises on October 4. (Tr. 63–66, 85, 174; GC Exh. 5 at 2.) The Respondent imposes its rule restricting Shelby's access to the exclusive hiring hall and refuses to remove the restriction despite her two apologies, the charge, complaint filing, and hearing in this matter. In the past, the Respondent's reversion of obtaining trespass notices with access restrictions against other members has been limited to threats of violence and destruction of property—none of which are involved in this

case—followed by the issuing of restraining orders. (See GC Exh. 4.)

Because Lucero's husband is a Las Vegas policeman, the Respondent effectively prevents Shelby from accessing the hiring hall without a police escort or risk a further arrest for trespassing should Lucero decide for any reason to call her husband and report Shelby for trespassing. The Respondent agrees that such a rule interferes with Shelby's ability to physically appear to gain access to the out-of-work list or for rollcall four times a year as required by the Union's rules. (R. Br. 8.) In addition, Shelby is prevented from other rights enjoyed by union members such as freely visiting, updating her skills, filing grievances, and verifying her leave and benefits on the hiring hall's second floor department without a police escort.

As a result, I find that the Respondent's restricted access rule against Shelby causes, attempts to cause, or prevents her from utilizing the hiring hall despite her continued status as a dues paying member and interferes with her employment given the hiring hall's exclusive nature and prevents or interferes with Shelby being hired or otherwise impairs the job status of Shelby. Moreover, I find that the restricted access rule demonstrates the Respondent's power and influence over Shelby's livelihood so dramatically as to compel an inference that the effect of the Respondent's actions in implementing the restricted access rule is to encourage union membership on the part of all employees who have perceived the display of power.

The Respondent further argues that Shelby must take some additional unwritten affirmative action of asking the Respondent to remove or rescind the restricted access rule to get rid of the police escort condition before it is lifted. (R. Br. 15.) I find that Shelby has adequately apologized for her October 4 outburst and that the Respondent must actively rescind the unlawful restricted access rule that applies only to Shelby. Instead, I find that the Respondent is obligated to affirmatively rescind the ongoing permanent restrictions of requiring a police escort for Shelby to gain access to the hiring hall.

As conceded by the Respondent, the Union violates Section 8(b)(2) and 8(a)(3) where there is some impact upon the employment relationship or when the union affects the employment of a member. (R. Br. 8 citing *Radio Officers v. NLRB*, 347 U.S. 17, 40 (1954). A union may breach its duty of fair representation without committing an unfair labor practice and vice versa. *Breining v. Sheet Metal Workers Local 6*, 493 U.S. 67, 86–87 (1989). Once again, a union breaches its duty of fair representation if its actions affecting employees whom it represents are arbitrary, discriminatory, or in bad faith and an action is arbitrary, in turn, "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." (R. Br. 10, quoting *Air Line Pilot Assn. v. O'Neill*, 499 U.S. 65, 67 (1991); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).)

The Board has held that the three-pronged *Vaca v. Sipes* standard applies to all union activity, including the operation of a hiring hall. *Plumbers Local 342 (Contra Costa Electric)*, 329 NLRB 688 (1999), enf. denied sub nom. *Jacoby v. NLRB*, 233

¹³ Because the complaint allegations are limited to those in pars. 6 and 7, I disregard any new allegations that the Respondent's actions were the result of any picketing activity by any group or were based on any racial discrimination as this is unrelated to the complaint allegations and there was no attempt to amend the complaint at hearing.

F.3d 611 (D.C. Cir. 2000).¹⁴ When a union purposely departs from the rules governing the operation of its hiring hall, it dramatically displays its power to affect an employee's livelihood. Such a deliberate departure constitutes arbitrary, discriminatory, or bad-faith conduct in violation of the duty of fair representation, and violates Section 8(b)(1)(A) and (2), unless the union can demonstrate that the departure was necessary to the effective performance of its representative function. *Plumbers Local 342 (Contra Costa Electric)*, 336 NLRB at 550, enfd. sub nom. *Jacoby v. NLRB*, 325 F.3d 301 (D.C. Cir. 2003); *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, 51 (1982), enfd. 701 F.2d 504 (5th Cir. 1983). Thus, a union bears the burden of establishing that its conduct was necessary for effective performance of its representational function. *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985), enfd. mem. 843 F.2d 1392 (6th Cir. 1988); *Boilermakers Local 433 (Riley Stoker Corp.)*, 266 NLRB 596 (1983).

While admitting that the Respondent's restricted access rule may actually restrict Shelby's ability to fulfill her requirement to physically appear at the hiring hall to gain access to a variety of employment and union activities as referenced above, the Respondent also argues that since Shelby has remained fully employed since November 2011, the questioned rule's impact on Shelby's employment has been speculative at best since she has not been on the out-of-work list or even eligible for it. (R. Br. 8.) This argument lacks merit, however, because the standard mentioned above does not apply simply to situations when a union member is unemployed due to a union's unlawful conduct but also where the union attempts to cause or prevents an employee from being hired or otherwise impairs the job status of an employee. See *Teamsters Local 456 (Louis Petrillo Corp.)*, 301 NLRB 18, 22 (1991). Here, by implementing the restricted access rule against Shelby, I find that the Respondent has impacted Shelby's employment by attempting to cause or preventing her from being employed or impairing her job status as the rule interferes with Shelby's ability to maintain her skills, file grievances, and participate in the Respondent's out-of-work list by arbitrarily restricting her access to the hiring hall. Moreover, I further find that the Respondent has failed to prove that imposing its permanent restricted access rule against Shelby was necessary to the effective performance of its function of representing its constituency especially in light of the considerable passage of time without further incident in the limited times Shelby accessed the hiring hall with her police escort.

Though it may be true that the Respondent had a legitimate reason to limit her access and ask Shelby to leave the hiring hall premises on October 4 when she swore at union agents and refused to leave the hall, the same is not true after she calmed

down later that day. To impose on her an ongoing permanent restriction preventing her free access to the premises without a police escort, however, after October 4 is arbitrary and irrational as she did not threaten violence against anyone or property damage against the facility as other trespassed members had which also resulted in the union obtaining restraining orders in the past. The Respondent has treated Shelby arbitrarily and disparately¹⁵ by imposing the police escort rule on her without any evidence that she poses a threat or caused property damage to the facility. Also, the Respondent has not shown that Shelby's past conduct warrants imposition of the restricted access rule against her. See, e.g., *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000), revd. 333 F.3d 927 (9th Cir. 2003) (member barred from hiring hall after 15 years of misconduct); *Longshoremen Assn. Local 341*, 254 NLRB 334, 337 (1981) (member barred from hiring hall because member instigated wildcat strike and picketing activities in violation of CBA terms).

By a preponderance of the evidence I find that the Respondent has not met its burden of establishing that its permanent restricted access rule against only Shelby was necessary for effective performance of its representational function. Instead, I find that the restricted access rule is overly burdensome to Shelby and unnecessary in light of the factual and legal landscape since October 4, 2011, the time of the Union's implementation of the rule. I further find that the Respondent's behavior in implementing its unwritten restricted access rule against only Shelby is so far outside a wide range of reasonableness as to be irrational. Accordingly, in agreement with the Acting General Counsel, I find that the Respondent violated Section 8(b)(1)(A) of the Act by imposing a restricted access rule against Shelby's access to the hiring hall which has restrained and coerced Shelby in the exercise of her rights guaranteed in Section 7 of the Act. I further find that the Respondent did not violate Section 8(b)(2) of the Act as alleged in the complaint and that portion of the complaint is dismissed.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. By arbitrarily requiring Shelby to be subject to a permanent restricted access rule requirement that she obtain a police escort to gain access to the hiring hall when her conduct on October 4, 2011, did not involve any threats of violence or property damage, Laborers' International Union of North America, Local 872, AFL-CIO has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

3. The Respondent did not otherwise violate the Act as alleged in the complaint.

¹⁴ In *Jacoby*, supra, the D.C. Circuit disagreed with the Board's application of a unitary duty-of-fair-representation standard to all union activity, holding that unions owe a heightened duty in the operation of a hiring hall. The Ninth Circuit has agreed with the D.C. Circuit in this regard. *Lucas v. NLRB*, 333 F.3d 927, 934-935 (9th Cir. 2003). I discuss this issue more fully hereafter. I need not decide here which standard should apply because, for reasons explained below, the Respondent's arbitrary imposition of its restricted access rule applied only against Shelby is unlawful under either a unitary or a heightened duty standard.

¹⁵ While the Acting General Counsel argues that the Respondent's restricted access rule against only Shelby also breached the duty of fair representation as being discriminatory, I do not agree as I do not find any evidence of animus or any suggestion in the record supporting a pretext for intentional discrimination or suggesting any other improper motive on the part of the Respondent.

REMEDY

The appropriate remedy for Laborers' International Union of North America, Local 872, AFL-CIO's unlawful conduct is an order requiring the Respondent to cease and desist and to take certain affirmative action. Specifically, the Respondent will be required to rescind its rule preventing Shelby from gaining access to the union's hiring hall facility without a police escort and the Respondent will contact the Las Vegas police department to report the rule rescission and acknowledge to the police that Shelby is a welcome dues paying member without any

restrictions on her access to the hiring hall facility. The Respondent shall also be required to remove from its files any reference to Shelby's ongoing access restriction beyond October 4, 2011, and to notify Shelby in writing that this has been done. In addition, the Respondent will be required to post a notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010). See, e.g., *Teamsters Local 25*, 358 NLRB 54 (2012).

[Recommended Order omitted from publication.]